

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

**KARL VAN SCOTT,**  
                    **Plaintiff,**

**v.**

**JOSH CHERISH, et al.,**  
                    **Defendants.**

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**C.A. No. 09-134 Erie**

**District Judge McLaughlin  
Magistrate Judge Baxter**

**MAGISTRATE JUDGE’S REPORT & RECOMMENDATION**

**I.     RECOMMENDATION**

It is respectfully recommended that Defendants Ostrowsky, Buchanon, McKenzie, Sabousky, Ruditis, Lyles, Smith, and Campbell be dismissed from this case due to Plaintiff’s failure to prosecute his claim against them.

**II.    REPORT**

**A.     Relevant Procedural History**

On August 4, 2011, District Judge Sean J. McLaughlin entered a Memorandum Order adopting this Court’s Report and Recommendation dated July 14, 2011. [ECF No. 51. As part of Judge McLaughlin’s Order, Plaintiff was ordered to file an amended complaint on or before August 24, 2011, identifying: (i) the supervisory Defendants whom Plaintiff claims had knowledge of Defendant Taylor’s alleged disclosure of Plaintiff’s medical condition to other inmates, and (ii) the basis upon which each such supervisory Defendant is alleged to have been personally involved in the alleged misconduct. (*Id.*). Judge McLaughlin’s Order provided further that “[f]ailure to file an amended complaint on or before August 24, 2011 will be construed by this Court as an indication that Plaintiff no longer wishes to pursue his claims against the supervisory Defendants.” (*Id.*). Plaintiff has failed to file an amended complaint within the time

prescribed by Judge McLaughlin's Order.

As a result, this Court issued a show cause Order on September 16, 2011, requiring Plaintiff to file an amended complaint in accordance with Judge McLaughlin's Order on or before September 26, 2011, and indicating that Plaintiff's failure to do so would result in this Court's recommendation that Defendants Ostrowsky, Buchanon, McKenzie, Sabousky, Ruditis, Lyles, Smith, and Campbell, be dismissed from this case due to Plaintiff's failure to show their personal involvement in the alleged violation of Plaintiff's Fourteenth Amendment right to medical privacy. [ECF No. 53]. Plaintiff has failed to comply with this Order, as well.

## **B. Discussion**

The United States Court of Appeals for the Third Circuit has set out a six-factor balancing test to guide a court in determining whether dismissal of a case is appropriate. Poulis v. State Farm Fire and Casualty Co., 747 F.2d 863 (3d Cir. 1984). The court must consider: 1) the extent of the party's personal responsibility; 2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery; 3) a history of dilatoriness; 4) whether the conduct of the party or attorney was willful or in bad faith; 5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and 6) the meritoriousness of the claim or defense. Id. at 868. Not all of the six factors need to weigh in favor of dismissal before dismissal is warranted. Hicks v. Feeney, 850 F.2d 152 (3d Cir. 1988).

Applying the Poulis factors to the present matter, this Court recommends the dismissal of Defendants Ostrowsky, Buchanon, McKenzie, Sabousky, Ruditis, Lyles, Smith, and Campbell from this case. Since the filing of Judge McLaughlin's Memorandum Order of August 4, 2011, Plaintiff has taken none of the necessary steps to prosecute his case against said Defendants. Further, Plaintiff has failed to timely comply with multiple Court orders. Plaintiff is proceeding *pro se* and therefore bears all of the responsibility for any failure in the prosecution of his claims. Alternative sanctions, such as monetary penalties, are inappropriate with indigent

parties. Although Plaintiff's allegations may state a claim upon which relief could be ultimately be granted, the merits of the claim are impossible to determine at this stage of the proceedings.

### **III CONCLUSION**

For the foregoing reasons, it is respectfully recommended that Defendants Ostrowsky, Buchanon, McKenzie, Sabousky, Ruditis, Lyles, Smith, and Cambell be dismissed from this case due to Plaintiff's failure to prosecute his claim against them.

In accordance with the Federal Magistrates Act, 28 U.S.C. § 636(b)(1), and Fed.R.Civ.P. 72(b)(2), the parties are allowed fourteen (14) days from the date of service to file written objections to this report and recommendation. Any party opposing the objections shall have fourteen (14) days from the date of service of objections to respond thereto. Failure to timely file objections may constitute a waiver of some appellate rights. See Nara v. Frank, 488 F.3d 187 (3d Cir. 2007).

/s/ Susan Paradise Baxter  
SUSAN PARADISE BAXTER  
United States Magistrate Judge

Date: October 4, 2011

cc: The Honorable Sean J. McLaughlin  
United States District Judge